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Gregory ak Gungo v Geofrey ak Tahang & Ors

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HIGH COURT (KUCHING) — CIVIL APPEAL NO KCH-12B-8/7 OF 2019
ALWI WAHAB J
9 APRIL 2020

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Civil Procedure — Damages — Assessment of damages — Sessions court dismissed appellant's claim for loss and damages — Appeal against decision — Whether plaintiff failed to prove damages — Whether quantum of damages awarded for such damages were fair and reasonable

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This was an appeal against the decision of the learned session court's judge ('SCJ') in dismissing the appellant's ('the plaintiff') claim for loss dan damages as a result of the road motor vehicles accident. In the sessions court, the trial proceeded on quantum of damages on injuries suffered by the plaintiff as the issue of liability was conceded by the first, second, fifth and sixth respondent ('the defendants') where a consent judgment was recorded. The plaintiff was on 30 May 2014 at about 9.30am, a passenger who was being transported in a lorry ('the lorry') which was driven by the fifth defendant whereas the sixth defendant was the owner of the lorry. The first defendant was the driver and the second defendant was the registered owner of a car ('the car'). At along Jalan Kota Samarahan/Mambong, the lorry was collided into by the car which was travelling from the opposite direction and had encroached into the said lorry's path of travel. The lorry in turn also collided against a motor vehicle driven by the third defendant when the third defendant abruptly stopped while trying to avoid the car driven by the first defendant which had encroached into the lorry's path of travel. The learned SCJ held that the plaintiff had failed to prove his claim for damages (special and general) and thus dismissed it with costs. Hence, there was this appeal. The issues for consideration were: (a) whether the learned SCJ had erred in facts and law in his findings that the plaintiff had failed to prove damages; and (b) whether the quantum of damages awarded for such damages were fair and reasonable based on the facts and circumstances of the present case.

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Held, allowing the plaintiff's appeal:

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(1) The defendants' allegation against the plaintiff were off the track as the liability was admitted and conceded by the defendants in view of the consent judgment. The plaintiff had proven that he had suffered the injuries as the result of the accident. According to Dr Chai Chiun Hian ('PW6'), the plaintiff's condition (post stroke) resulted from the said

road traffic accident. Dr Shahid Masud Baig ('PW2') confirmed that the plaintiff's left hemiplegia had caused the plaintiff to suffer from slurring of speech and mild facial asymmetry. The learned SCJ was therefore erred in his decision when he ruled that the plaintiff had failed to prove that he had suffered damages as the result of the said road traffic accident when the medical evidence stated otherwise that there was a link between the plaintiff's injuries and disabilities with the accident (see paras 21–22 & 25–27).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim mahkamah sesyen yang bijaksana ('SCJ') yang menolak tuntutan perayu ('plaintif') untuk kerugian dan ganti rugi akibat kemalangan kenderaan bermotor jalan raya. Di mahkamah sesyen, perbicaraan diteruskan mengenai jumlah ganti rugi ke atas kecederaan yang dialami oleh plaintif kerana isu tanggungjawab diakui oleh responden pertama, kedua, kelima dan keenam ('defendan-defendan') di mana penghakiman persetujuan direkodkan. Plaintif pada 30 Mei 2014 sekitar jam 9.30 pagi, adalah seorang penumpang yang sedang dibawa dengan sebuah lori ('lori') yang dipandu oleh defendan kelima manakala defendan keenam adalah pemilik lori tersebut. Defendan pertama adalah pemandu dan defendan kedua adalah pemilik berdaftar sebuah kereta ('kereta'). Di sepanjang Jalan Kota Samarahan/Mambong, lori itu dilanggar oleh kereta yang bergerak dari arah yang bertentangan dan telah melanggar jalan perjalanan lori tersebut. Lori tersebut juga bertembung dengan kenderaan bermotor yang dipandu oleh defendan ketiga ketika defendan ketiga tiba-tiba berhenti ketika cuba mengelakkan kereta yang dipandu oleh defendan pertama yang telah melanggar jalan perjalanan lori tersebut. SCJ yang bijaksana memutuskan bahawa plaintif gagal membuktikan tuntutannya untuk ganti rugi (khas dan umum) dan dengan itu menolaknya dengan kos. Oleh itu, rayuan ini. Isu-isu untuk pertimbangan adalah: (a) sama ada SCJ yang bijaksana telah melakukan kesalahan dalam fakta dan undang-undang dalam penemuannya bahawa plaintif telah gagal membuktikan kerugian; dan (b) sama ada jumlah ganti rugi yang diberikan untuk kerugian tersebut adalah adil dan munasabah berdasarkan fakta dan keadaan kes ini.

Diputuskan, membenarkan rayuan plaintif:

(1) Tuduhan defendan terhadap plaintif tidak sesuai kerana liabiliti diakui oleh defendan memandangkan penghakiman persetujuan. Plaintif telah membuktikan bahawa dia mengalami kecederaan akibat kemalangan itu. Menurut Dr Chai Chiun Hian ('PW6'), keadaan plaintif (strok) berpunca daripada kemalangan jalan raya tersebut. Dr Shahid Masud Baig ('PW2') mengesahkan bahawa hemiplegia kiri plaintif menyebabkan plaintif menderita kecacatan bertutur dan asimetri wajah ringan. Oleh itu, SCJ yang bijaksana terkhilaf dalam keputusannya

ketika beliau memutuskan bahawa plaintif telah gagal membuktikan bahawa dia telah mengalami kerugian akibat dari kemalangan jalan raya tersebut ketika keterangan perubatan menyatakan sebaliknya bahawa ada kaitan antara kecederaan dan kecacatan plaintif dengan kemalangan (lihat perenggan 21–22 & 25–27).]

Cases referred to

Ang Yee Cheng & Anor v Ang Siang Hock (person under disability suing through Koh Beng Guek, litigation representative) [2016] 9 MLJ 238; [2016] 2 PIR 47, HC (refd)

Izzat Haikal v Tan Boon Lain [2011] 1 PIR 28 (refd)

Sarbjit Singh Khaira (Jasminderjit Kaur with him) (Khaira & Co) for the appellant.

Ian Lee (Arthur Lee, Lin & Co) for the respondents.

Alwi Wahab J:

INTRODUCTION

[1] This is an appeal against the decision of the learned session court's judge ('SCJ') given on 10 July 2019 in dismissing the appellant's (the plaintiff in sessions court) claim for loss dan damages as a result of the road motor vehicles accident.

[2] In the sessions court, the trial proceeded on quantum of damages on injuries suffered by the appellant as the issue of liability was conceded by first, second, fifth and sixth respondent (the first, second, fifth and sixth defendants in the sessions court) where a consent judgment was recorded on 2 January 2018. See the consent judgment sealed by the court under encl 61.

[3] Pursuant to the consent judgment, the first respondent's liability was apportioned to 50% (with the second respondent be held vicariously liable) and also the fifth respondent's liability was apportioned to 50% (with the sixth respondent be held vicariously liable). By the same judgment the writ against third and fourth defendants in the sessions court had been struck off.

[4] For convenience, the appellant and the first, second, fifth and sixth respondents in this appeal are referred to as the plaintiff and the first, second, fifth and sixth defendants respectively as their being referred to in the sessions court.

THE BRIEF FACTS

[5] The plaintiff was on the 30 May 2014 at about 9.30am, a passenger who was being transported in a lorry ('the said lorry') bearing registration No QAA213G which was driven by the fifth defendant whereas the sixth defendant is the owner of the said lorry.

[6] The first defendant was on the material day the driver and the second defendant was the registered owner of a car bearing registration No QAK8151 ('the said car').

[7] At along Jalan Kota Samarahan/Mambong, the said lorry was collided into by the said car which was travelling from the opposite direction and had encroached into the said lorry's path of travel. The said lorry in turn also collided against a motor vehicle bearing registration No QAM 4503 driven by third defendant when the third defendant abruptly stopped while trying to avoid the said car driven by the first defendant which had encroached into the said lorry's path of travel.

THE LEARNED SCJ'S FINDINGS

[8] On the issue of damages, it was the learned SCJ's findings that the stroke suffered by the plaintiff were not as a result of the road traffic accident on 30 May 2014 because the stroke was only occurred on 6 June 2014, subsequent to the accident. Dr Chai Chiun Hian ('PW6') of Neurology Department of Sarawak General Hospital who prepared the medical report (exh P2(8)) diagnosed the plaintiff with right hemispheric syndrome secondary to right middle cerebral artery territory infarct suggestion of secondary to right internal carotid artery dissection.

[9] The other medical report exh P52 prepared by Dr Shahid Masud Baig ('PW2') of Normah Hospital on the request of the defendants shows that the plaintiff condition has not improved due to dissection of right internal carotid artery.

[10] Having said that, the learned SCJ was of the view that there were no other injuries suffered by the plaintiff apart from the soft tissue injury when he was treated for the first time after the accident on 30 May 2014 (see the exh P2(9) prepared by Dr Lau Lih Bing of Tanah Putih Health Clinic).

[11] The learned SCJ was of the view that PW2's report in exh P52 was based on the medical documents shown by the plaintiff to PW2 particularly the medical report prepared by PW6 and the conclusion made by PW2 in his report that the injuries sustained by the plaintiff was as the result of the road

accident was what actually been told to him by the plaintiff and not based on his own examination of the plaintiff. The learned SCJ was referring to PW2's evidence in cross-examination that he had not done the CT scan on the plaintiff.

[12] The learned SCJ was of the view that the possibility of the injuries occurring not immediately after the road traffic accident as in the present case and as claimed by PW2 is not supported without the evidence of a proper medical examination being conducted on the plaintiff when he was referred to PW2.

[13] The learned SCJ held that as the plaintiff had failed to prove his claim for damages (special and general) as the result of the accident on the balance of probabilities, hence he dismissed it with costs of RM15,000 for the defendants.

[14] For the sake of completeness, had he been wrong in deciding the above and assuming that the plaintiff had proven that he had suffered damages, the learned SCJ assessed the quantum as follows:

DAMAGES	SESSIONS COURT
Right hemispheric syndrome secondary to right middle cerebral artery (MCA) territory infarct suggestive of secondary to right internal carotid artery (ICA) dissection — left hemiplegia	RM300,000
Soft tissue injury, abrasion wound on the forearm	RM1,500
Police reports	RM24
Medical reports	RM80
JPJ search	RM50
Cost of purchasing nutritious food	RM835
Pre-trial nursing care	RM5,400
Loss of income	RM67,650
Wheelchair and crutches	RM540
Travelling expenses for family members during the plaintiff's admissions at SGH	RM1,500
Travelling expenses for follow up treatments	RM8,300

THE PLAINTIFF'S SUBMISSION

[15] Before this court, it was the plaintiff's submission that the learned SCJ had erred in his findings that the plaintiff had failed to prove damages when the evidence adduced in court shows otherwise. The plaintiff further submitted that the learned SCJ had misdirected himself when he failed to award damages

for soft tissue injury suffered by the plaintiff contrary to his own findings that there was such an injury when the plaintiff was treated at Tanah Puteh Health Clinic.

[16] The plaintiff also submitted that the learned SCJ had been erred when he awarded costs to the defendants despite liability was conceded by the defendants.

[17] The plaintiff was also not satisfied with the quantum of damages awarded by the learned SCJ had he found that the plaintiff had succeeded in proving damages.

THE FIRST, SECOND, FIFTH AND SIXTH DEFENDANTS' SUBMISSION

[18] The defendants are basically supporting the decision of the learned SCJ that there was no nexus between the stroke injury suffered by the plaintiff and the road traffic accident.

[19] The defendants submitted that by sitting next to the fifth defendant in the said lorry belonging to the sixth defendant, the plaintiff had voluntarily consented to accept the risk of injury that may be occasioned to him and/or to waive any claim in respect of such risk should it happened.

[20] It was also the defendants' submission that the plaintiff had not taken any safety precaution or measure for not fastening his seat belts while travelling in the said lorry and therefore the defendants would rely on the principle of *volenti non fit injuria* against the plaintiff.

THIS COURT'S FINDINGS

[21] Upon perusing the defendants' written submission, their allegation that plaintiff had not taken any safety measure as he did not fasten his seat belt which had resulted in the injuries and the plaintiff, by sitting next to the fifth respondent in the said lorry belonging to the sixth defendant, the plaintiff had voluntarily consented to accept the risk of injury that may be occasioned to him, are in my view, off the track as the liability is admitted and conceded by the defendants in view of the consent judgment. The purpose of the trial before the sessions court as the parties had understood was to determine the quantum of damages which the plaintiff is entitled due to the admission of liability by the defendants. It is my view that the issues for determination is whether the learned SCJ had been erred in facts and law in his findings that the plaintiff had failed to prove damages and if the plaintiff had succeeded in proving damages,

whether the quantum of damages awarded for such damages are fair and reasonable based on the facts and circumstances of the present case.

[22] Having considered the submissions and records of appeal, I am of the view that the plaintiff has proven that he has suffered the injuries as the result of the accident that happened on the 30 May 2014.

[23] The evidence of soft tissue injury was adduced from the medical report prepared by Dr Lau Lih Bing of Tanah Puteh Health Clinic (exh P2(9)).

[24] The plaintiff was also diagnosed with Right Hemispheric Syndrome secondary to right Middle Cerebral Artery ('MCA') territory infarct suggestive of secondary to right Internal Carotid Artery ('ICA') dissection by Dr Chai Chiun Hian ('PW6') of Neurology Department from Sarawak General Hospital.

[25] According to PW6, the plaintiff current condition (post stroke) is resulted from the said road traffic accident.

[26] Another expert witness ie Dr Shahid Masud Baig ('PW2') confirmed in his medical report (exh P52) that the plaintiff's left hemiplegia had caused the plaintiff to suffer from slurring of speech and mild facial asymmetry.

[27] The learned SCJ is therefore erred in his decision when he ruled that the plaintiff had failed to prove that he has suffered damages as the result of the said road traffic accident when the medical evidence stated otherwise that there was a link between the plaintiff's injuries and disabilities with the accident.

[28] As such, I allowed the plaintiff's appeal.

[29] The quantum of damages allowed are as follows:

DAMAGES	PLAINTIFF	DEFENDANTS	SESSIONS COURT (assuming that the plaintiff has proven that he suffered damages)	HIGH COURT
Right hemispheric syndrome secondary to right middle cerebral artery ('MCA') territory infarct suggestive of secondary to right internal carotid artery ('ICA') dissection — left hemiplegia	RM350,000	RM267,500	RM300,000	RM300,000 (see Ang Siang Hock's case [2016] 9 MLJ 238; [2016] 2 PIR 47)
Soft tissue Injury, abrasion wound on the forearm	RM10,000	RM1,500	RM1,500	RM10,000 (see Izzat Haikal v Tan Boon Lain [2011] 1 PIR 28)
Mild facial asymmetry	RM10,000	RM0	RM0	Not allowed as the claim is overlapping with the first heading — left hemiplegia

DAMAGES	PLAINTIFF	DEFENDANTS	SESSIONS COURT (assuming that the plaintiff has proven that he suffered damages)	HIGH COURT
Slurring of speech	RM10,000	RM0	RM0	Not allowed as the claim is overlapping with the first heading — left hemiplegia
Total				RM310,000
Police reports	RM24	RM24	RM24	RM24
Medical report From Tanah Puteh and SGH	RM80	RM80	RM80	RM80
JPJ Search	RM50	RM0	RM50	RM50
Traditional Treatment	RM4,000	RM0	RM0	RM4,000
Cost of medical expenses	RM2,000	RM335	RM0	RM335
Damage to personal effects	RM650	RM0	RM0	RM650
Cost of purchasing nutritious food	RM1,200	RM835	RM835	RM835
Wheelchair and crutches	RM540	RM0	RM540	RM540
Travelling expenses during both admissions	RM1,500	RM1,500	RM1,500	RM1,500

DAMAGES	PLAINTIFF	DEFENDANTS	SESSIONS COURT (assuming that the plaintiff has proven that he suffered damages)	HIGH COURT
Travelling Expenses for follow ups	RM8,300	RM7,400	RM8,300	RM8,300
Total				RM16,314

For the pre and post-trial nursing care and the loss of income

Pre-trial nursing care	RM23,850	RM135,000 (and continuing)	RM5,400	RM23,850 (RM450 x 53 months) 53 months (4 years and 5 months from the date of accident 30 May 2014 until the trial commences 2 November 2018)
Post-trial nursing care	RM1,034,471.90			RM1,034,471.90 Hiring cost for maid for 27 years (75 years is the average life of expectancy minus the plaintiff's age of 48) agency fee, meals, accommodation, basic personal hygienic, second year insurance and second year levy charges

Maid's salary	RM324,000 RM1000 per month x 324 (27 years)			RM324,000
Loss of income	RM80,870.61	RM67,650	RM67,650	RM80,870.61
Total				RM1,463,192.51

CONCLUSION

[30] The grand total for the quantum of damages to be awarded to the plaintiff is RM1,789,506.51 (RM310,000 + RM16,314 + RM1,463,192.51).

[31] I also award costs of RM20,000 for the plaintiff.

[32] Interest on judgment sum of 5% from date of judgment until realisation.

Plaintiff's appeal allowed.

Reported by Ahmad Ismail Illman Mohd Razali